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CHAPTER 6

FLOGGING A DEAD HORSE

THE INCONGRUITY OF MEASURES AGAINST TERRORIST FINANCING IN SOUTHERN AFRICA

Annette Hübschle

Introduction

A 2005 United States (US) congressional report identifies 26 'priority' countries as being particularly vulnerable to terrorist financing. The list is classified, as officials believe that letting terrorists know which countries have lax controls would prompt them to move monies there and publicising such assessments would discourage cooperation from the countries on the list. The vulnerability of these 26 'priority' countries to terrorist financing is based on US intelligence assessments.[1] It is probable that quite a few of these 'priority' countries are in Africa.

Curbing the flow of terrorist money has become one of the hallmarks of the international campaign to fight terrorism since the September 11 2001 (hereafter 9/11) attacks. Past anti-terrorism strategies were predominantly *ex post facto* in nature; in other words, responses were developed once an act of terrorism had occurred. Measures aimed at limiting terrorist financing are thought to prevent terrorists from carrying out terrorism in the first place. The thinking is that by denying terrorists access to finances, their prospects of carrying out acts of terrorism could be undermined, if not prevented. The trajectory of this argument may be questionable; however, the international community has put its weight behind the successful implementation of measures aimed at combating terrorist funding.

Globally, the banking sector has become the entry point for measures aimed at regulating and controlling the flow of funds. The developed world has very sophisticated banking systems, with the control mechanisms deemed appropriate. However, the advantages of computerised bank tellers and electronic record keeping have not trickled down to many parts of the developing world. In fact, this chapter shows that most Southern African

Development Community (SADC) countries have made slow progress in implementing international financial recommendations against terrorist financing. The chapter provides an overview of domestic measures in the sub-region, juxtaposed with evidence and occurrence of terrorist financing. The chapter starts with comments on definition and theory.

A note on definition

The international community has actively sought consensus on the definition of terrorism for many years. Thirteen separate international conventions on terrorism have been signed, each covering a specific type of activity linked to terrorism. Despite United Nations (UN) pressure, broad ratification has been difficult to achieve. The task of creating a comprehensive, binding international convention against terrorism has proved to be a slow and tiresome process, as all fails when the question of defining terrorism is tackled. A major point of friction is whether terrorism should apply to the actions of states in the same manner that it applies to the actions of non-state actors.

Defining terrorism has been a particularly difficult task in Africa. In fact, most legal drafters stay clear of defining it but rather describe an 'act of terror' or 'terrorist activity'. In this chapter, the definition of 'terrorist act' in the Organisation of African Unity (OAU) Convention on the Prevention and Combating of Terrorism (Algiers Convention) is adopted. Thus, 'terrorist act' relates to:

(a) Any act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:
    (i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or
    (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
    (iii) create general insurrection in a State.

> (b) any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in paragraph (a) (i) to(iii). (end quote)

What differentiates the Algiers Convention from others on terrorism is that in terms of its definition, struggles for national self-determination are not deemed to be terrorist.

Article 3(1) provides:

> Notwithstanding the provisions of Article 1, the struggles waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.

International action

Financial controls are recognised as essential and indispensable counter-terrorism tools. A series of measures at the national, regional and international level have been introduced and enforced in an effort to deprive terrorists of the means to inflict serious damage.

The first major multilateral convention adopted with the express objective of requiring states to suppress the financing of terrorism was the International Convention for the Suppression of the Financing of Terrorism. The Convention opened for signature on 9 December 1999. It covers the offence of direct involvement or complicity in the financing or collection of funds for terrorist activity. Article 2(1) requires states to create an offence when a "person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used" to commit an act that constitutes a terrorist offence.[2]

In the immediate aftermath of the 9/11 attacks, the United Nations Security Council (UNSC) adopted Resolution 1373, which imposed unprecedented legal obligations on UN member states to comply with measures designed to counter terrorist financing, travel, recruitment and supply.

Concerning measures against the funding of terrorism, the resolution states:

> …all States shall:
> (a) Prevent and suppress the financing of terrorist acts;
> (b) Criminalise the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
> (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;
> (d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons.[3]

To monitor the enforcement of these and other anti-terrorism measures, the UNSC created the Counter-Terrorism Committee. In March 2004, the Council set up the Counter-Terrorism Executive Directorate to serve as a professional secretariat for implementation of counter-terrorism strategies.

US President George W. Bush issued Executive Order 13224 entitled 'Blocking Property and Prohibiting Transactions with Persons who Commit, Threaten to Commit, Or Support Terrorism' on 14 September, 2001. This expanded the US list of designated terrorist organisations to include over 30 individuals and organisations that have allegedly committed, or been involved in, acts of terrorism. Most importantly, the Order observes the global reach of terrorists by imposing extraterritorial financial sanctions against all "foreign persons that support or otherwise associate with these foreign terrorists".[4]

Another beacon of strength in the US fight against terrorist financing are elements of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (also known as the USA PATRIOT Act). Major anti-money laundering and terrorist financing provisions include the following:

- the definition of financial institutions is extended;
- the onus to 'know your customers' is placed on financial institutions;
- US banks are prohibited from opening correspondent accounts for foreign banks with no physical presence, no employees or no regulatory supervision;
- due diligence will be invoked when dealing with senior political figures, their families and close associates; and
- informal money transmitting businesses have to seek an operating license and report suspicious transactions.

The Financial Action Task Force on Money Laundering (FATF) adopted the Eight Special Recommendations on terrorist financing in October 2001. The FATF was established by the G7 Heads of State in 1989 at the G7 Summit. The FATF policy recommendations included the call for ratification and implementation of relevant international instruments, the freezing and confiscation of suspected terrorist assets, reporting of suspicious transactions, evaluation of alternative remittances and wire transfers and revision of laws and regulations related to non-profit and charity organisations. A new measure was passed late in October 2004, which calls on states to stop cross-border movements of currency and monetary instruments related to terrorist financing and money laundering and to confiscate such funds. The recommendation stipulates a limit (of US $15 000) for undeclared cash that can be carried across borders. Furthermore, it proposes control over cash couriers through intervention of national authorities on the basis of intelligence or police information.

Theoretical backdrop: Money laundering versus terrorist financing

The International Monetary Fund (IMF) defines terrorist financing as "the processing of property from any source (perhaps a legitimate one) to be used to

finance terrorist activity that has been or will be committed".[5] Analysts agree that terrorist financing is linked to many of the same techniques as money laundering; hence, many of the countermeasures are similar. Furthermore, some terrorist organisations are known to finance their activities out of the proceeds of crime. Nonetheless, terrorist financing differs from money laundering in several ways that affect public policy:

- terrorist financing is mostly directed at future action, thus the only offence that may have been committed when the financing takes place is conspiracy to commit a terrorist act; and
- the amounts needed to finance terrorism are widely believed to be relatively small.

Some analysts regard 9/11 as a defining moment in international concern around money laundering. It was no longer perceived as the laundering of criminal proceeds only, but as the means by which terrorists hide their revenue generating processes and gain access to funds. Difficulties arise from applying money laundering legislation that relies on the assumption that money laundering has implied or specific predicate offence. Terrorism may or may not derive financial reward, but it will ultimately use funds that obtain from legitimate or illegitimate sources. A further recognition is that terrorists are ad hoc clients of the global financial network. Their usage of the financial system may be limited to having funds available when needed, while using a laundering process to separate the financial backers from an act of terror.[6]

The impact of 9/11 and the introduction of various pieces of anti-terrorism legislation have focused attention on the traditional money-laundering model. Ideally, suspicions of both money laundering and terrorist financing would be reported to the banking sector regulator or whatever financial supervisory authority is in place, although the processes that need to be followed to identify these are not necessarily the same. Money laundering involves converting the proceeds of crime into apparently clean funds. Terrorist financing, on the other hand, can involve either illegal or legitimate funds being paid to a party associated with terrorism. Obviously, where there is a link between terrorist financing and money laundering, the identification of terror finances is made easier.

However, the guidance issued by the FATF suggests that the way to identify terrorist financing is by reporting suspicions of money laundering. The underlying assumption is that all terrorist financing will involve a type of money laundering. This excludes those cases where the money used to finance terrorist activities originated from legitimate sources.

Although there are myriad official lists, the detection of terrorist funding is still a difficult undertaking. Specific aspects of terrorist funding that make its detection more difficult are the size and nature of the transactions involved. Contrary to popular beliefs, mounting an act of terror does not always require large sums of money and the associated transactions do not have to be complex. The 9/11 hijackers are a point in case. An examination of their finances revealed that most of the individual transactions were small sums below the unusual cash transaction reporting thresholds, and in most cases consisted of wire transfers. The hijackers were ostensibly foreign students, who appeared to be receiving money from their parents to support their studies.[7]

Forensic auditors agree that identifying terrorist funding sourced by apparently legitimate funds will continue to pose a challenge. Beyond the FATF guidelines and related regulations, they recommend that transactions should be subject to additional scrutiny, when:

- a dormant account containing a minimal sum suddenly receives a deposit or series of deposits followed by daily cash withdrawals; and
- an account on which several persons have 'signature authority' despite their appearing to have no obvious relation to each other.[8]

Most strategies aimed at curbing the threat of terrorism are *ex-post facto* in nature; in other words, strategies are developed once an act of terrorism has occurred. Policy-makers and legislators perceive regulations aimed at curbing terrorist financing as serving to prevent terrorists from carrying out their deeds in the first place.

Requirements of 'due diligence' and 'know your customer' are easily fulfilled in a corporate computerised banking environment. The advantages of computerised bank tellers and electronic record keeping have not trickled down

to many parts of the developing world. Compliance with international regulations may involve more than signing an international convention, as there are immediate institutional, logistical, training, staffing and related needs linked to successful implementation of such measures. A general concern is that while effective anti-money laundering and terrorist financing laws are necessary, they may push such illegal activities outside of the formally regulated sector.

In this chapter, the focus is on what have been termed 'illegal' means of funding terrorist activities, as opposed to 'legitimate' means of doing so.

Supportive measures

As a prerequisite to a serious anti-terrorist financing regime, domestic legislation must be in place that provides the general legal framework and establishes the obligations of financial institutions and other providers of financial services. Such legislation needs to define and criminalise money laundering and terrorist financing with penalties. It has to cover a wide set of predicate crimes and also needs to define the responsibilities and powers of the various government agencies involved. Commercial banks are obliged to be especially vigilant, given their role in the payment system.[9]

For primary legislation to be operational, banking regulations and supervision must be implemented. Financial institutions must instigate procedures to avoid dealing with criminal and terrorist elements. Checks should be undertaken on the identity and legitimacy of clients, especially new clients and those acting on behalf of others. The 'know your customer' obligation may involve elaborate background checks in lieu of the globalisation of business dealings and transactions. Measures should be in place to ensure that criminals or terror financiers do not gain control of financial institutions. Otherwise, detecting or rooting out the financing of terror activities or money laundering would be a virtually impossible endeavour. Shareholders and senior managers in financial institutions, therefore, should demonstrate that they are 'fit and proper' to hold these positions of control and oversight. This applies to the initial licensing stage but consideration has to be given to the eventuality of management turnover and changes in shareholdings.

Further, financial institutions must establish systems of identifying and reporting unusual transactions. The financial institutions themselves are threatened by terrorist financing and money laundering and thus their staff need to be trained to spot unusual or suspicious transactions.

Linked to 'know your customer' and the reporting of unusual transactions is the need for adequate record keeping. When a suspicious transaction is investigated, a financial institution needs to be able to help authorities establish an audit trail going as far back as five years. A recent money laundering case involving funds controlled by General Abacha has also demonstrated the need for financial institutions to focus more attention on the 'layering stage', where laundered funds or terror finances are already in the system and the audit trail is disguised, often using numerous transactions to move funds around.[10]

Tied to the last point is the need of governments to establish a supervisory institution that ensures that the relevant commercial enterprises follow the laws and regulations and that any suspected cases of money laundering or terrorist financing can be monitored. Typically such financial sector regulators are responsible for supervising anti-money laundering and terrorist financing procedures followed by financial institutions and for checking that their managers, owners and shareholders meet the 'fit and proper' test. Many countries have also set up specialised agencies called financial intelligence units (FIUs). Their mandate includes investigating, analysing and passing on to the appropriate authorities financial and related information concerning suspected proceeds of crime or terror funds. A key component of an FIU's mandate is to share information about suspicious transactions across borders. The Egmont Group, set up in 1995, serves as an association of FIUs and promotes best practice among its members. International co-operation between FIUs in cases of terrorist financing or money laundering is encouraged and based on mutual trust. Part of the mandate of FIUs is to ensure that national legal standards and privacy laws are not conceived in such a way that inhibits the exchange of information. Thus, FIUs should be able to exchange information freely with other FIUs on the basis of reciprocity or mutual agreement and consistent with procedures understood by the requested and requesting party.

Evidence of terrorist financing in the SADC region?

Evidence of incidents of terrorist financing is mostly anecdotal and unsubstantiated in the SADC region. Southern Africa has very rich mineral resources such as gold, diamonds, uranium and gemstones. Following 9/11, there were allegations that the African diamond and gold trade was used to support the terror network, al Qaeda.

Questions around the African diamond trade date back to the days of the Cold War, when the superpowers used various African nations as pawns in their geo-political conflicts. They funnelled weapons to what were termed 'local proxies' and egged on the combatants. With the end of the Cold War, the super powers lost interest in Africa and arms and ammunition became less available through direct channels. It was at this stage that the trade in illicit diamonds escalated. Wars and even a few governments became reliant on the illegal trade in 'conflict diamonds' and 'blood diamonds'. Notably, the civil war in Angola was prolonged by both the covert support of the UN and by the sale of diamonds by the terrorist movement, União Nacional para a Independência Total de Angola (UNITA).[11] Diamonds, gold and other mineral resources are a grim reminder of the ongoing extraction of wealth and life from the African continent. As Bill Fletcher notes:

> The use of diamonds to fuel these continuing conflicts is emblematic of the inability of the continent to develop a coherent policy toward its own natural resources. The countries of North America and Western Europe—and the multinational corporations based there—have been extremely successful in playing off competing interests to extract the wealth of the continent. It is not just that diamonds are used to fuel civil wars, but that there remains an international oligopoly over the sale and distribution of diamonds. While African military and paramilitary factions can and do use the sale of diamonds to finance their operations, none of this would work without the international diamond industry and the retail outlets that sell these jewels. If there were no buyers, there would be no sellers.[12]

The north-east parts of the Democratic Republic of Congo (DRC) hosts one of Africa's richest goldfields. Competition to control the gold mines and trading routes has only spurred on bloody conflict since the onset of the Congolese

war in 1998. Warring factions see control of gold mines as a sure means to procure money, guns and power. Not only have combatants carried out widespread ethnic slaughter, executions, torture, rape and arbitrary arrest, but "gold has been a curse to those who have the misfortune to live there".[13]

The tanzanite scandal spun by two *Wall Street Journal* reporters has gained notoriety due to its adverse effects on the Tanzanian gemstone industry.[14] It was suggested that al Qaeda controlled a sizeable chunk of the tanzanite trade. The rare blue gemstone is mined in a 13km^2 patch of graphite rock in the north-eastern Tanzanian region of Arusha. Tanzanian investigators could find no evidence of al Qaeda using tanzanite to finance its efforts. However, the publication of the allegations led to major US retailers dropping tanzanite from their sale offerings. The US market provided more than 80% of tanzanite export earnings and thus the livelihoods of miners, cutters, manufacturers, suppliers and dealers was compromised.[15] Then in February 2002, a Tanzanian delegation attended a major gem trade show in Tucson, Arizona where dealers were assured that no terrorist group was profiting from the sale of tanzanite. The Tucson Tanzanite Protocol originates from that meeting. Like the Kimberly Certification Process, it established a system of warranties guaranteeing that the gems were mined and exported legally. The United Republic of Tanzania declared the mining site a controlled area where no visitors are allowed without a dealer's license and other identification.[16]

Another cause for concern has been the sub-region's long, porous and unpatrolled borders. Police forces from several member countries have encountered, and at times arrested, suspects who attempted to export huge amounts of US dollars from SADC countries. The apprehension by Mozambican police of four Pakistani nationals, suspected of attempting to smuggle close to a quarter million US Dollars out of the country, is a case in point. Law enforcement officials did not rule out terrorist financing in this case.[17] A few months before 9/11, two South African nationals were arrested when they attempted to cross South Africa's border with Swaziland with more than half a million US Dollars stuffed into their underwear. Initially authorities believed that the two suspects were trying to evade South African currency regulations. Investigators then found that they had travelled from the South African port of Durban through Swaziland to neighbouring Mozambique more than 150 times over an 18-month period. Links emerged between the suspects, an exchange bureau in the Mozambican capital of Maputo and gold dealers in Dubai.[18] Suspicions arose about connections to al Qaeda.

Most cases involving suspicions of terrorist financing involve a lot of speculation; law enforcement agencies and other responsible authorities (such as FIUs and national intelligence agencies) are understandably apprehensive to share leads, successes and failures with the general public.

A key issue to consider is that most financial and business transactions occur in the informal economic sectors of SADC countries. In fact, with the probable exception of South Africa and Mauritius, the informal economic sectors are by far more prominent than the formal sectors in SADC countries. Also known as the parallel market, unrecorded trade or the cash economy, these sectors provide for the livelihood of millions of Africans. Its magnitude is undetermined in most SADC countries. In Tanzania, 6% of the population use banks for depository purposes,[19] while only 4% of Malawians are banked.[20] These figures are replicated in most SADC countries. The size of financial transactions within informal sectors also remains a conundrum waiting to be cracked. Increasingly, the international community have come to regard informal sectors as a hub of illegal activities, with little or no state control. This has often led to informal sectors being identified as the weakest link in African countries, which are abused by organised criminals in many cases. The link to terrorist financing has not been ruled out. Charles Goredema observes with regards to vulnerabilities in the informal sectors:

> Detection of suspicious financial transactions is very problematic. In some countries, the authorities responsible perform a virtually passive role, and often have to rely on anonymous 'whistleblowers'. This compromises the capacity to detect funds destined to support terrorist activity.[21]

As the international community, with its various protocols, starts cracking down on the trade in conflict diamonds and other mineral resources tainted with innocent blood, a window may be opened for warlords, organised criminals to collude with terrorist elements in the sub-region. The few examples mentioned in the previous paragraphs illustrate that illegal activities that could possibly be linked to the funding of terrorism are predominantly happening in the largely unknown and unregulated terrain of the informal sector. Before looking at the status of anti-terrorist financing legislation in the SADC sub-region, the question occurs whether 'western' regulations and controls aimed at formalised financing sectors in the developed world could ever suffice in the developing world with its different set of conditions.

Status of domestic anti-terrorist financing legislation in Southern Africa

Seven SADC countries have ratified the International Convention for the Suppression of the Financing of Terrorism. They are Botswana, Lesotho, Malawi, Mauritius, South Africa, Swaziland and Tanzania.[22]

The following section provides a country-by-country account of SADC member states' legislation aimed at curbing terrorist financing. .

Angola

The financing of terrorism and/or terrorist acts is punishable under the Angolan Penal Code. Articles 263 (Association of Malefactors), 282 (Illicit Organisations), 283 (Secret Associations) and articles 349 and 350 of the Penal Code, which refer to crimes against the security of people, address terrorist financing. According to the Organic Law of the National Bank (Banco Nacional de Angola),[23] the National Bank of Angola can require any public or private entity to provide directly the necessary information relating to monetary and exchange policy, as well as the functioning of the payments system, with the purpose of regulating, overseeing and ensuring their efficiency.[24]. Furthermore, the Bank can investigate suspicious transactions.[25]

Botswana

Botswana has started to introduce measures to ensure that funds owned by its nationals or in its jurisdiction are not used to fund terrorists. The Bank of Botswana issued a circular to the country's financial institutions with instructions and strict measures to ensure that the financial institutions do not provide a safe haven for terrorist activities and to further freeze all the financial assets of suspects.

Botswana has strict anti-money laundering laws. The Proceeds of Serious Crimes Act of 1990[26] proscribes the conduct of money laundering and bestows a heavy sentence upon conviction. It also is used for the purposes of seizing the fruits of criminal activities. The Act omits a definition of terrorism, yet Section 17 obliges a designated body to adopt internal measures to prevent and detect the

commission of a serious offence under the Act. Since terrorism is considered a serious offence, it is deemed to be covered under the Act.[27]

The Mutual Assistance in Criminal Matters Act (1990) aims to facilitate reciprocal co-operation between Botswana and other countries with similar legislation. Complemented by the Extradition Act of 1990, it doubles up as a means of enforcing the Proceeds of Serious Crimes Act extra-territorially. Botswana has also enacted the Corruption and Economic Crime Act of 1994 and the Banking Act of 1995. The Corruption and Economic Crime Act created the Directorate on Corruption and Economic Crime, a law enforcement agency tasked with the investigation and prosecution of serious economic crimes, corruption and money laundering. The Banking Act, among other things, allows law enforcement agencies to access information on the bank accounts of suspected criminals, entrenches the 'know your customer' principle and creates an obligation on banks and their external auditors to report suspicious transactions to the central bank and/or law enforcement agencies.[28]

Democratic Republic of Congo

The DRC passed foreign exchange regulations in 2001.[29] Act No 003/2002 of February 2002 addresses the operation and oversight of credit institutions. Thus under Article 75 credit institutions are required to declare:

> (1) Sums of money entered on their books that appear to be derived from drug trafficking or other criminal activities;
> (2) Transactions that concern sums of money that appear to be derived from drug trafficking or other criminal activities.[30] (endquote)

In its country report to the UN Counter Terrorism Committee (CTC), the DRC listed additional laws that could be used to deal with terrorist financing. These include the following:

- The Customs Brigade was established by Ordinance No 79-114 of 15 May. Its functions include border surveillance, prevention and inspection and administration and protection of national heritage functions.[31]
- Article 2 of the Ordinance No 89/101 of May 1989 led to the creation of the General Tax Directorate, which carries out all assignments and exercises

all prerogatives relating to fiscal matters, such as the tax base, control, collection and disputes over direct and indirect taxes, royalties and tax charges.[32]

- Article 4 of Decree-Law No 002/2002 of 26 January 2002 provides for the establishment of specialised provincial inspection units, which, among other things, are responsible for suppressing gangs, fraud and drug trafficking.[33]

Lesotho

Lesotho does not have the legislation to address the financing of terrorism as required by the UN Security Resolution 1373. According to the Second Report to the CTC, the Central Bank of Lesotho has put administrative measures in place to detect and address terrorist financing.[34]

The mountain kingdom is in the process of developing a comprehensive anti-terrorism policy and legislation, of which the prevention of terrorist financing will be a key component. In the interim, provisions directed at the financing of terrorism may be included in the Draft Money Laundering and Proceeds of Crime Bill.

In its Second Report to the CTC, Lesotho acknowledges that, although there was no specific offence termed 'financing of terrorism', substantive terrorist acts would constitute offences such as murder, kidnapping, causing grievous bodily harm, unlawful possession of dangerous weapons, serious damage to property under common law or by statute. It is hence argued that financiers of terrorism would be caught by common law as parties (aiding and abetting accomplices) to the offence. Similarly, parties who agree to fund terrorist activities could be subject to prosecution for conspiracy.[35]

Problematic in this context is that these ancillary offence provisions do not extend to extraterritorial offences committed by nationals outside Lesotho. Furthermore, there are questions as to the sufficiency of the ancillary offence provisions in the context of terrorist financing. The Internal Security (General) Act 1984 is cited as addressing some issues around this. Section 8 makes it an offence:

> to give, lend or otherwise make available money or property knowing, suspecting or intending that the money or property will or may be applied or used for all or in connection with the commission, preparation or instigation of any subversive activity.[36]

Other measures that could be used to address terrorist financing include the Financial Institutions (Anti-Money Laundering) Guidelines of 2000, the Prevention of Corruption and Economic Offences Act, No. 5 of 1999 and the Criminal Procedure and Evidence Amendment Act, No. 3 of 2001. The Financial Institutions Guidelines require financial institutions to implement sound anti-money laundering policies and procedures, 'know your customer' rules and the reporting of suspicious transactions.

Lesotho has been urged to pass money laundering legislation, criminalise terrorist financing and establish a financial intelligence unit that can serve as a coordinating body to fully implement anti-money laundering laws. Once the new laws are enacted, the onus would be on the government and international donor organisations to ensure that adequate resources are given to all regulatory, law enforcement and prosecution agencies to implement the laws.

Malawi

The government of Malawi prepared a draft Money Laundering and Proceeds of Serious Crime Bill in 2002, which was subsequently revised to be tabled in Parliament in 2004, but by December 2005 this had not happened. Local money laundering experts predict an uncertain future for the draft bill. The earliest date envisaged its tabling is September 2006.[37]

Legislation to address terrorist financing is insufficient. Section 49 of the Banking Act of 1989 requires banks and financial institutions to identify their customers. The Reserve Bank of Malawi is responsible for monitoring compliance with these requirements. The Malawi government has prepared a comprehensive Customer Due Diligence Directive (Regulation/Guidelines) for banks and financial institutions.

Measures that could be applied to forfeit terrorist property include the Exchange Control Regulations and Chapter 45:01 of the Exchange Control Act.

Mauritius

The island nation of Mauritius has an arsenal of legislation to deal with terrorist financing. On 14 December 2004, the country ratified the International Convention for the Suppression of the Financing of Terrorism. An Act by the same name (i.e. the Convention for the Suppression of the Financing of Terrorism Act 2003) gave force of law to the obligations taken by Mauritius when it became party to the Convention. The Financial Intelligence and Anti-Money Laundering Act 2002 established the Financial Intelligence Unit, which is responsible for receiving, requesting, analysing and disseminating to investigatory and supervisory authorities disclosures of financial intelligence, and a Review Committee.[38]

The main intention of the Anti-Money Laundering (Miscellaneous Provisions) Act of 2003 is the formation of the National Committee for Anti-Money Laundering and Combating of the Financing of Terrorism. The Act empowers the FIU to issue guideline to financial institutions, cash dealers and members of relevant professions and occupations on the submission of Suspicious Transaction Reports (STRs) to the FIU. The Bank of Mauritius and the Financial Services Commission can issue codes and guidelines on anti-money laundering and the combating of financing of terrorism, and enforce their compliance.[39]

Mauritius lists the following laws as having a bearing on the combating of terrorist financing:

- the Dangerous Drugs Act of 2000;
- the Dangerous Drugs (Amendment) Act of 2003;
- the Prevention of Corruption Act of 2002;
- the Financial Intelligence and Anti-Money Laundering regulations of 2003;
- the Banking Act of 1988;
- the Banking Act of 2004 and the Bank of Mauritius Act of 2004;
- the Financial Services Development Act of 2001;
- the Insurance (Amendment) Act, No. 22 of 1990;
- the Securities (Central Depository, Clearing and Settlement) Act, No.30 of 1996;
- the Stock Exchange Act, No. 30 of 1988;

- the Trusts Act, No. 14 of 2001;
- the Unit Trusts Act, No. 26 of 1989;
- the Foreign Exchange Dealers Act of 1995; and
- the Financial Reporting Act, No. 45 of 2004.

Mozambique

Like most of its neighbours, Mozambique has no specific legislation that criminalises the financing of terrorism. Yet, lawmakers cite the following laws and regulations as being sufficient in dealing with persons that support and fund terrorist activities:

- Pursuant to 9/11, the Central Bank of Mozambique issued the Central Bank Regulation No. 2/SBM/2002, which introduced new control measures and bank supervision. This includes 'know your customer' and due diligence requirements, verification of foreign exchange operations, record keeping and the reporting of suspicious transactions.[40]
- The Anti-Money Laundering Law (Act no. 7/2002) deals with money laundering offences, such as the "manufacture, import or export, trading of arms and explosives, terrorism, extortion, corruption, embezzlement, black-marketing and tax evasion".[41] The law is designed to tackle money laundering and fails to sufficiently address the funding of terrorism.
- The Foreign Exchange Law (Act no. 3/96) and Notice no. 5/GGBM/96.
- Article 311 of the Criminal Proceedings Code sees to the freezing of funds linked to criminal activities.[42]

Namibia

In 2004, Namibia passed the Prevention of Organised Crime Act aimed at combating organised crime including money laundering activities. The Financial Intelligence Centre Bill is likely to be passed before the end of 2006. It aims at creating a financial intelligence unit for the purposes of collecting financial data from a variety of financial institutions. At the time of writing, the Drugs Control Bill and the Combating of Terrorist Activities Bill were with legal drafters.

The process of getting the laws passed is more than likely to extend beyond 2006.

The Bank of Namibia Act, No. 15 of 1997, established Namibia's central bank, the Bank of Namibia. It has regulatory and supervisory functions over the operations of banking institutions as determined in Banking Institutions Act 1998, No. 15 of 1998. Section 50 of the Banking Institutions Act obliges banking institutions to report suspicious transactions to the Bank of Namibia. To implement this provision, the Governor issued a determination on money laundering in June 1998[43] and another on reporting suspicious transactions and transactions above a stipulated threshold. In terms of the former determination, the Bank of Namibia adopted the Statement of Principles as stipulated by the Basle Committee on Banking Regulations and Supervisory Practises of December 1998. Banking institutions were instructed to conduct their business in line with those principles.

Furthermore, the Bank of Namibia encouraged banking institutions to develop a 'know your customer' policy, which incorporates procedures for identifying customers when they open accounts. In addition, record keeping and 'due diligence' in the conduct of business with customers (in order to recognise unusual business patterns, which may raise suspicion), the reporting of suspicious transactions, internal control procedures, staff awareness and training were encouraged. With regard to funds transfers, especially those involving international funds, the Bank of Namibia set out minimum requirements and guidelines to prevent money laundering or terrorist financing. A further determination addresses the appointment, duties and responsibilities of directors and principal officers of banking institutions.

Once a suspicious transaction has been detected, the Bank of Namibia can launch an investigation, search and seize evidence. Should tainted money be lodged with a Namibian bank, the Bank of Namibia can instruct the money to be frozen pending further investigations. It also can provide assistance to corresponding foreign banks or states, should there be suspicions that tainted money was channelled through Namibia.

In the absence of dedicated anti-money laundering and anti-terrorist financing legislation and taking the statutory powers of the Bank of Namibia into

consideration, Namibia lacks the institutional and legislative capacity to detect the financing of terrorism.

South Africa

Together with the island nation of Mauritius, South Africa is best equipped to combat terrorist financing in southern Africa. Over the past decade, it has developed a comprehensive legal structure to deal with money laundering. This form of crime was first criminalised in the pursuit of drug traffickers in 1992. The main statutes dealing with terrorist financing are the Prevention of Organised Crime Act 1998 (POCA) and the Financial Intelligence Centre Act 2001 (FICA). While the former contains comprehensive measures to freeze and confiscate the proceeds and instruments of crime, including both criminal confiscation and civil forfeiture, the latter established the Financial Intelligence Centre (FIC), its primary objective being the introduction of mechanisms and measures aimed at preventing and combating a wide range of money-laundering activities. The FICA has thus created an anti-money laundering regime that encourages voluntary compliance and self-regulation by institutions that otherwise may be exploited for money laundering purposes. The FICA and POCA are complementary.[44]

With the enactment of the anti-terror legislation in the form of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004, the POCA and FICA were amended to accommodate measures against terrorist financing. Thus, the title of the FICA (and key elements within the legislation) was amended to:

> …establish a Financial Intelligence Centre and a Money Laundering Advisory Council in order to combat money laundering activities and the financing of terrorist and related activities; to impose certain duties on institutions and other persons who might be used for money laundering purposes and the financing of terrorist and related activities; to amend the Prevention of Organised Crime Act, 1998, and the Promotion of Access to Information Act, 2000; and to provide for matters connected therewith.[45]

The POCA now aims:

> …to introduce measures to combat organised crime, money laundering and criminal gang activities; to prohibit certain activities relating to racketeering activities; to provide for the prohibition of money laundering and for an obligation to report certain information; to criminalise certain activities associated with gangs; to provide for the recovery of the proceeds of unlawful activity; for the civil forfeiture of criminal (assets) property that (have) has been used to commit an offence, (or assets) property that (are) is the proceeds of unlawful activity or property that is owned or controlled by, or on behalf of, an entity involved in terrorist and related activities; to provide for the establishment of a Criminal Assets Recovery Account.[46]

Thus, the financing, participation in and support of terrorist activities are a criminal offence in South Africa and punishable under the new laws.[4747] Other South African laws that are useful for the prosecution and combating of terrorist financing are:

- the Drugs and Drug Trafficking Act (No. 140 of 1992);
- the Banks Act (No. 94 of 1990);
- the Banks Amendment Act (No. 19 of 2003);
- the Non-Profit Organisations Act (No. 71 of 1997);
- the Income Tax Act (No. 58 of 1962);
- the Mining Act (No. 20 of 1967);
- the Diamond Act (No. 56 of 1986); and

Swaziland

The kingdom of Swaziland has had the Money Laundering (Prevention) Act since 2001 (No. 12 of 2001). The Act, inter alia, places certain obligations on financial institutions, such as record keeping for five years and suspicious transactions reporting. The supervisory authority is vested with the Governor of the Central Bank of Swaziland. The onus is on financial institutions to report suspicious transactions. The Act further enables the freezing and forfeiture of criminal assets and property. What differentiates the Act from many anti-money laundering laws in the sub-region is the listing of 'terrorism' as one of the

'prescribed offences' for money laundering. Terrorism itself has not been criminalised in Swaziland, yet money or properties used to fund terrorist activities fall squarely into the ambit of money laundering offences.

Other acts that may be useful in the prosecution of terrorist financing are:

- the Serious Offences (Confiscation of Proceeds) Act 2001; and
- the Prevention of Corruption Order 1993.

Tanzania

Since 2002, the United Republic of Tanzania has had the Prevention of Terrorism Act on its statute books. This Act provides that every person should disclose suspicious transactions relating to terrorist acts to the relevant authorities. The penalty for failure to disclose is imprisonment for between two and five years. Under the same statute, each person is duty-bound to disclose information relating to property of terrorist groups or property used for the commission of offences.

Elements of the Proceeds of Crime Act of 1991, Mutual Assistance in Criminal Matters Act of 1991 and the Prevention of Terrorism Act of 2002 provide the legislative framework for the freezing of suspected criminal and terrorist accounts at banking and financial institutions.[48]

The central bank, the Bank of Tanzania, issued Administrative Circular No. 8 on Money Laundering Control to banks and financial institutions in 2000. The Administrative Circular obliges such institutions:

- to develop anti-money laundering policies and procedures;
- to keep a record of transactions;
- to verify the identity of customers before establishing a banking relationship with them;
- to train staff in all aspects of money laundering; and
- to develop a reporting mechanism of suspicious transactions to law enforcement agencies.[49]

The Administrative Circular has no force of law, yet Section 17 of the Banking and Financial Institutions Act of 1991 empowers the Bank of Tanzania to supervise all banks and financial institutions in the United Republic of Tanzania. Thus, the Bank of Tanzania may:

> require any bank or financial institution within such time as it may stipulate, to furnish any information or to comply with any order, directive or determination issued or made by the bank pursuant to all the powers of the bank conferred on it under this act or the Bank of Tanzania Act.[50]

Other acts deemed useful by Tanzanian state authorities in the prosecution of terrorist financing are:

- the Economic and Organised Crimes Control Act of 1984;
- the Prevention of Corruption Act No.16 of 1971; and
- the Societies Act 9 (Chapter 337) and Societies Act No. 6 of 1995 (Zanzibar).

However, Tanzania lacks laws and procedures to regulate informal systems of money remittance, such as *hawala*.

Zambia

Although Zambia is not yet a signatory to the International Convention for the Suppression of the Financing of Terrorism, the country's anti-money laundering legislation may be applied in combating the funding of terrorism.[51] The Prohibition of Money Laundering Act No. 14 of 2001, inter alia, effected the establishment of an Anti-Money Laundering Investigation Unit; suspicious transactions reporting by commercial banks to the central bank, the Bank of Zambia; the forfeiture of property of persons convicted of money laundering; and international cooperation in investigations, prosecution and other legal processes of prohibiting and preventing money laundering.[52]

Other legislative measures that could be employed to address the funding of terrorism are:

- the Organizations (Control of Assistance) Act, Chapter 116 of the Laws of the Republic of Zambia;

- the Societies Act, Chapter 119 of the Laws of the Republic of Zambia;
- the Anti-Corruption Commission Act (Chapter 91-Vol. 7); and
- the Narcotic Drugs and Psychotropic Substances Act (Chapter 96-Vol. 7).

Zimbabwe

Zimbabwe has no specific anti-terrorism legislation on its statute books, although the government of Robert Mugabe has come under fire for laws[53] that have been created or amended to ostensibly combat terrorism, but that are applied to suppress political opposition. With regards to the fight against terrorist financing, the Bank Use Promotion and Suppression of Money Laundering Act (No. 2 of 2004) is the most useful. The Act seeks to establish a specialised unit to promote bank use and to fight money laundering. Section 14 of the Act prohibits unlawful trading in cash by any entity other than a financial institution.

The Serious Offences (Confiscation of Profits) Act (Chapter 9:17, 1992) sees to the confiscation of the profits of crime, including serious drugs and money laundering offences. Following 9/11, the Act was amended to include terrorist financing under both serious and specified offences.[54]

The Prevention of Corruption Act, the Criminal Matters (Mutual Assistance) Act, the Exchange Control Act and the Exchange Control (Amendment) Act Regulations, 2004 and the Exchange Control (General Amendment) Order, 2004 are also considered useful for the combating of terrorist financing.

Domesication of international regulations versus country-specific needs and conditions

The aim of the previous section was to provide a general country-by-country overview of existing laws that may be applied to combat terrorist financing in SADC. With the notable exception of Mauritius and South Africa, little progress has been made to match them with international instruments regarding terrorist financing and the operative provisions of UN Resolution 1373. Experts in many countries point to the lack of political will within the respective governments, while government spokespersons and stakeholders argue that Africa's priorities lie elsewhere. The 'war on terror' finds little resonance in Southern Africa (with

the exception of Tanzania), where the majority of the population faces an uphill battle in ensuring their daily bread and butter. Political agendas in the sub-region tend to focus on the need for poverty and hunger alleviation, education, job creation, eradication of HIV/Aids and other diseases and the fight against malaises undermining development, such as corruption.[55] Many SADC countries find themselves in a catch-22 situation, as World Bank credit and international financial support are increasingly linked to compliance with, and implementation of, the international anti-terrorist legal regime.

Financial experts often point out that the operative provisions of the various instruments are not feasible and applicable to the conditions of developing nations. First and foremost, only a small percentage of the population in SADC is banked. Thus, most financial transactions occur in the cash economy or the informal economic sector. As a result measures sponsored by the FATF, US and UN seem misdirected in the first place, as the focus of these measure is the regulation of the banking and financial 'formal' sectors. Second, the measures seem to be geared at accommodating the formalised banking and financial sectors of industrialised nations. Most banks in the sub-region have not entered the 21st century in terms of computerisation, record keeping or simple measures to which bank customers in the developed world are accustomed. Put simply, many banks are not operating in a paperless environment. Furthermore, there are structural issues that undermine simple requirements such as 'know your customer'. Countries such as Tanzania, Malawi, Zambia have no system of national identification in place. Furthermore, many people in Southern Africa have no fixed residential address because of different urban planning systems, making, for example, the provision of utility bills as proof of residence, unworkable.

International technical assistance has been forthcoming in the development stages of money laundering and terrorist financing legislation in SADC countries, but few international and local funds are available when it comes to putting words to action. Considering that international instruments aimed at combating terrorist financing seem to be directed at the formalised banking sectors of the developed world, it is perhaps not surprising that, despite international pressure, few strides have been made in domesticating international recommendations and the operative provisions of UN Resolution 1373 in the SADC sub-region.

Conclusion

Money laundering and terrorist financing are not typically linked to financial instability or lack of economic prosperity or development. However, these activities are not just by-products or precursors to acts of crime or terrorism, but they taint the image and reputation of individuals, institutions and nation-states. A financial institution's good name is at stake if it is unwittingly used by terrorists or criminal elements. More is at stake if staff collude with criminal elements to launder funds or channel financing to terrorists. Thus, the risks faced by financial institutions in respect of money laundering and/or facilitation of terror financing are manifold.

While traditionally these activities have been seen as an operational risk, reputational and regulatory risks are now recognised as big issues. Recent regulatory attention in this area has been focused on the larger banks, with the smaller institutions being perceived as posing a smaller risk. However, this focus has now changed dramatically, with smaller institutions being increasingly scrutinised.[56] Can smaller financial institutions meet the requirements that are placed on them? Can countries with limited resources, capacity and expertise meet these requirements? Certainly, the previous sections have attempted to sketch an overview of the difficulties experienced by SADC countries in complying with international financial regulations regarding terrorist financing.

A general concern is that while effective anti-money laundering and terrorist financing laws are required, they may push such illegal activities outside of the formally regulated sector. In light of the weak financial sectors and large informal cash economies in many developing countries, illegal activities are more than likely to flourish within the confines of the mostly unregulated informal sector. Thus, the campaign against terrorist financing in Southern Africa may benefit from gaining a better understanding of the nature and size of the informal economic sector.

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